in the

Supreme Court

of the

United States

OCTOBER TERM, 1973

No. 73-853

SUSAN JILL FORBICETTA

Petitioner,

vs.

UNITED STATES OF AMERICA

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

JACK FREED
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S. FOWLER & CO., INC. — MIAMI, FLORIDA

TABLE OF CONTENTS

	Page
OPINIONS BELOW	2
JURISDICTION	2
QUESTIONS PRESENTED	2
STATEMENT OF THE CASE	3
REASONS FOR GRANTING THE WRIT	5
CONCLUSION	9
CERTIFICATE OF SERVICE	10

APPENDIX

(A)	Opinion, U.S. Ct. of Appeals, Fifth Circuit (9/19/73).	App. 1
(B)	Judgment, U.S. Ct. of Appeals, Fifth Circuit (9/19/73)	App. 8
(C)	Petition for Rehearing, U.S. Court of Appeals, Fifth Circuit (10/2/73)	App. 11
(D)	Order Denying Petition for Rehearing, U.S. Ct. of Appeals, Fifth Circuit (11/2/73)	App. 21
(E)	Motion to Stay Mandate, U.S. Ct. of Appeals, Fifth Circuit (11/11/73)	App. 25
(F)	Order Granting Motion to Stay Mandate, U.S. Ct. of Appeals, Fifth Circuit (11/15/73)	App. 31

TABLE OF AUTHORITIES

Case	Page
Henderson v. United States, 390 F.2d 805 (9th Cir. 1967)	5
In Re Murchison, 349 U.S. 133, 136, 75 S.Ct. 623, 625, 99 L.Ed. 942	8
Knapp v. Kinsey, 232 F.2d 458 (1956)	8
Santabello v. New York, 404 U.S. 257 (1971)	6
United States v. Gilda-Avila, 468 F.2d 184 (1972)	5
United States v. Guadalupa-Garza, 421 F.2d 876 (9th Cir. 1970)	5
United States v. Johnson, 425 F.2d 630 (1970), rehearing denied June 2[illegible] 1970, Certiorari granted 91 S.Ct. 2294, Certiorari dismissed 92 S.Ct. 38, 9 Cr.L 4023, Supreme Court No. 577 argued 4/19/71	5
United States v. Shields, 453 F.2d 1235 (1972)	5
Whitaker v. McLean, 73 App. D.C. 259, 118 F.2d 596	8

STATUTORY AUTHORITIES

United States Code

Title 21 U.S.C. Sec. 952 (a)	3
Title 21 U.S.C. Sec. 841 (a) (1)	3
Title 28, U.S.C. Sec. 1254 (1)	2

in the

Supreme Court

of the

United States

OCTOBER TERM, 1973

No. _____

SUSAN JILL FORBICETTA

Petitioner,

vs.

UNITED STATES OF AMERICA

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

Petitioner, SUSAN JILL FORBICETTA, prays that a Writ of Certiorari issue to review the opinion and decision of the United States Court of Appeals for the Fifth Circuit entered on September 19, 1973, and denial of Petition for Rehearing entered on November 2, 1973.

OPINIONS BELOW

The opinion and decision of the Court of Appeals is not yet reported. A copy of the opinion is attached hereto as Appendix "A". A copy of the Judgment is attached hereto as Appendix "B". A copy of the Order denying Petition for Rehearing is attached as Appendix "D". The Order Granting Stay of Mandate is attached as Appendix "F".

JURISDICTION

The opinion of the United States Court of Appeals for the Fifth Circuit, which is sought to be reviewed, was entered September 19, 1973, that Court entering a further order on November 2, 1973, denying Petition for Rehearing. The present Petition for Writ of Certiorari is being filed within thirty (30) days of that order.

Petitioner invokes the jurisdiction of this Court under Title 28, Section 1254 (1).

QUESTIONS PRESENTED

I

SHOULD THE DECISION OF THE UNITED STATES COURT OF APPEALS, FIFTH CIRCUIT, INVOLVING A BORDER "STRIP SEARCH", BE REVIEWED, WHERE THE OPINION AND DECISION DEPARTS FROM ESTABLISHED CASE LAW INVOLVING BORDER "STRIP SEARCHES" AND IS IN DIRECT CONFLICT WITH OPINIONS AND DECISIONS OF ANOTHER UNITED STATES COURT OF APPEALS?

II

SHOULD THE DECISION OF THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT, INVOLVING A PRE-TRIAL STIPULATION WHICH WAS NOT KEPT BY THE PROSECUTOR, BE REVIEWED, WHERE THE DECISION DEPARTS FROM AND IS IN CONFLICT WITH, A DECISION OF THE UNITED STATES SUPREME COURT?

III

SHOULD THE SUPREME COURT EXERCISE ITS POWER OF SUPERVISION WHERE THE FIFTH CIRCUIT HAS SO FAR SANCTIONED THE TRIAL COURT'S OPEN HOSTILITY AND PREJUDICIAL BIAS AND DEPARTURE FROM THE ACCEPTED AND USUAL COURSE OF JUDICIAL PROCEEDINGS?

STATEMENT OF THE CASE

The Petitioner had been charged by a two count Indictment, Count I charging that the Defendant knowingly, intentionally and unlawfully imported into the United States in violation of Title 21 U.S.C. Sec. 952 (a) and Count II charged, that the defendant knowingly, intentionally and unlawfully possessed with intent to distribute cocaine in violation of Title 21 U.S.C. Sec. 841 (a) (1).

The Petitioner, among other Motions, filed a Motion to Suppress, which Motion was denied.

The prosecutor and defense counsel entered into a written pre-trial Stipulation Agreement, providing, among other things, that Petitioner would waive Jury Trial and proceed without a jury; that the chemist would not have to come down from Georgia to testify that the contraband was cocaine; that the testimony from the Motion to Suppress would be adopted; that the Prosecutor would recommend $2,500 surety bond pending Appeal and a sentence of two years, if the Petitioner was found guilty.

The prosecutor utilized the Stipulation to waive jury and adopt testimony from the Motion to Suppress and to introduce evidence without the chemist, per the stipulation.

At the time of sentencing, a different prosecutor appeared and would not honor the Stipulation Agreement. When defense counsel tried to apprise the Court of the Stipulation Agreement, the Court held defense counsel in contempt, fined him One Hundred ($100.00) Dollars, called him a liar, said he was unfit to practice law here and he was removed from the Court Room by the United States Marshal.

The United States Circuit Court of Appeals for the Fifth Circuit in affirming the Trial Court Judgment, rendered an opinion and decision in direct conflict with previous decisions of the United States Court of Appeals for the Ninth Circuit and the United States Supreme Court. A Motion for Rehearing was denied. A Motion to Stay Mandate was granted. This Petition for Certiorari ensued.

REASONS FOR GRANTING THE WRIT

I

THE OPINION AND DECISION BY THE TRIAL COURT AND THE UNITED STATES COURT OF APPEALS, FIFTH CIRCUIT, ARE IN OPEN AND DIRECT CONFLICT WITH OPINIONS AND DECISIONS OF THIS COURT AND THE UNITED STATES COURT OF APPEALS, NINTH CIRCUIT.

The instant case involves a "strip search" at Miami International Airport wherein the petitioner was singled out, removed to a private examination room and "strip searched".

The United States Court of Appeals, for the Ninth Circuit, has clearly and concisely set forth the standard for "strip searches" at an international border in the following line of cases: *Henderson v. United States,* 390 F.2d 805, 808 (1967); *United States v. Guadalupa-Garza,* 421 F.2d 876 (1970); *United States v. Johnson,* 425 F.2d 630 (1970), rehearing denied June 22, 1970, Certiorari granted 91 S.Ct. 2294, Certiorari dismissed 92 S.Ct. 38; *United States v. Shields,* 453 F.2d 1235 (1972) and *United States v. Gilda-Avila,* 468 F.2d 184 (1972). In *United States v. Johnson,* supra, this Court, after exhaustive oral examination, 9 Cr L 4023, *U.S. v. Johnson,* No. 577 argued 4/19/71, dismissed the Government's Petition for Writ of Certiorari.

In the instant case, the United States Court of Appeals, Fifth Circuit, in affirming the trial court, disre-

garded and departed from the standard set forth in the foregoing line of cases. Their affirming opinion cites recent cases involving baggage searches at domestic air terminals and has nothing whatsoever to do with "strip searches" of a person at an international border.

This direct conflict of opinions and decisions between the United States Court of Appeals for the Fifth Circuit and the United States Court of Appeals for the Ninth Circuit should be settled by this Court.

II

THE OPINION AND DECISION OF THE TRIAL COURT AND THE UNITED STATES COURT OF APPEALS, FIFTH CIRCUIT, IS IN DIRECT CONFLICT WITH THE UNITED STATES SUPREME COURT OPINION AND DECISION IN *SANTABELLO v. NEW YORK*, 404 U.S. 257 (1971).

In the instant case a written pre-trial stipulation was entered into between the prosecution and the defense. The prosecution utilized this agreement to their advantage and to the detriment of the defendant. This agreement was honored by the defense but was not kept by the prosecutor.

The United States Supreme Court in *Santabello v. New York*, supra, at page 267 stated:

> "Where the 'plea bargain' is not kept by the prosecutor, the sentence *must be vacated.*" (emphasis added).

The opinion and decision in the instant case departs from and is in conflict with this Court and should be reviewed.

III

THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT HAS SO FAR SANCTIONED THE TRIAL COURT'S DEPARTURE FROM THE ACCEPTED AND USUAL COURSE OF JUDICIAL PROCEDURE AS TO CALL FOR THE EXERCISE OF THIS COURT'S POWER OF SUPERVISION.

The Trial Judge was openly hostile and prejudicially biased against the defendant and defense counsel throughout these proceedings and sentencing. A brief review of the record makes this fact abundantly clear. Defense Counsel, an officer of the Court, was continually badgered, unnerved, belittled, accused and threatened by the Trial Judge.

The Trial Judge, for no cause whatsoever, among other things:

1. Called Defense Counsel a liar.
2. Stated he was unfit to practice law here.
3. Threatened him with investigation.
4. Held him in Contempt.
5. Fined him $100.00, thereby causing Defense

> Counsel to be removed from the Court Room by the United States Marshal.

In the case of *Knapp v. Kinsey*, 232 F.2d 458 (1956) the Circuit Court of Appeals, Sixth Circuit stated:

> "In re Murchison, 349 U.S. 133, 136, 75 S. Ct. 623, 625, 99 L.Ed. 942, the Supreme Court said 'Fairness of course requires an absence of actual bias in the trial of cases. But our system of law has always endeavored to prevent even the probability of unfairness.' In Whitaker v. McLean, 73 App. D.C. 259, 118 F.2d 596 the Court said — *'Hostility is a form of bias . . .'* The policy . . . is that the courts of the United States 'shall not only be impartial in the controversies submitted to them but shall give assurance that they are impartial'; i.e. shall appear to be impartial." (Emphasis added)

In the instant case we find a record that is replete with the trial court's prejudicially biased actions and statements toward the defendant's counsel.

This departure from accepted and usual court of judicial proceedings, so far sanctioned by the United States Court of Appeals for the Fifth Circuit, calls for this Court to exercise its power of supervision to correct the Trial Judge's departure from and disregard of accepted and usual judicial proceedings.

CONCLUSION

For these reasons, a writ of certiorari should be issued to review the judgment and opinion of the Fifth Circuit.

Respectfully submitted,

/s/ Jack Freed
JACK FREED
1390 S. Venetian Way
Miami Beach, Florida 33139
305/379-3647

CERTIFICATE OF SERVICE

I, JACK FREED, attorney for Petitioner, hereby certify that I have this 30th day of November, 1973, served by Air Mail three copies of the foregoing Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit as follows:

1. On the United States Attorney, by hand delivering three printed copies thereof to the office of Robert Rust, United States Attorney for the Southern District of Florida, at 14 N.E. First Avenue, Suite 300 Ainsley Building, Miami, Florida 33132, and by hand delivering three printed copies to the Solicitor General, Department of Justice, Washington, D.C. 20530.

/s/ Jack Freed
JACK FREED

APPENDIX A

APPENDIX A
IN THE

United States Court of Appeals

FOR THE FIFTH CIRCUIT

No. 73-1974
Summary Calendar*

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

versus

SUSAN JILL FORBICETTA,
Defendant-Appellant.

Appeal from the United States District Court for the Southern District of Florida

---

(September 19, 1973)

Before GEWIN, COLEMAN and MORGAN, Circuit Judges.

COLEMAN, Circuit Judge: In a Bench trial, Miss Forbicetta was convicted of the knowing, intentional, and unlawful importation of cocaine in violation of 21 U.S.C., §1952(a), and of the knowing, intentional, and

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*Rule 18, 5 Cir.; see Isbell Enterprises, Inc. v. Citizens Casualty Company of New York, et al., 5 Cir. 1970, 431 F.2d 409, Part I.

unlawful possession with intent to distribute cocaine in violation of 21 U.S.C., §841(a)(1).

It could not have been denied that on November 21, 1972 the appellant arrived at Miami International Airport on a flight from Bogota, Colombia, carrying, while concealed on her person, 2 1/2 pounds of cocaine. An attack upon the validity of the search which discovered the cocaine provided the only hope of avoiding a conviction. The search was found valid, we agree, and the convictions are affirmed.

This was a border search, accomplished at the very time the appellant was entering the United States from abroad. The evidence reflected that according to the experience of customs officials at Miami, a high percentage of the individuals discovered in the act of attempting to smuggle cocaine at the Miami International Airport arrived on flights from Bogota; the American women discovered in this activity were usually young, clean looking, and traveling alone; women discovered carrying cocaine on their persons usually wore loose-fitting dresses to conceal the bulkiness of the packages hidden beneath their clothing; usually when an official could not see the contours of a feminine figure under loose-fitting dresses, even when the subject was in a bending position, the wearer generally had something strapped to her waist; individuals attempting to smuggle cocaine usually carried only one suitcase and no items to declare so as to clear customs quickly; it had been observed that it was very unusual for young people to go on vacations to Colombia if they had no relatives there; and the usual air-

line female traveler ordinarily wore tight-fitting clothes.

In this context Miss Forbicetta arrived from Colombia, traveling alone, with one suitcase, and no liquor or other items requiring customs inspection. She was young (age 21), thin, clean looking, and attractive. She was wearing a loose-fitting dress. When she bent to pick up her suitcase, the dress revealed no contours of her figure.

The customs official then questioned Miss Forbicetta. Her passport revealed that she was from Brooklyn. She said that she had been a bank teller, was unemployed, had gone to Colombia for a vacation, and had no relatives in Colombia.

She was then referred to two female customs inspectors. They, in the presence of none others, in a room which had no windows, asked the appellant to remove her dress and slip. The customs inspectors then could easily see that something was concealed under the remaining girdle. Upon removal of that garment, there appeared seven large packets, containing the 2 1/2 pounds of cocaine.

Under an abundance of precedent, this was a lawful border search, *United States v. Thompson*, 5 Cir., 1973, 475 F.2d 1359; *United States v. Skipwith* [No. 72-1932, slip opinion dated June 14, 1973], 5 Cir., 1973, ____ F.2d ____; *United States v. Cyzewski* [No. 72-3368, slip opinion dated August 29, 1973], 5 Cir., 1973, ____ F.2d ____; *United States v. Maggard*, 5 Cir., 1971, 451 F.2d 502;

United States v. Briones, 5 Cir., 1970, 423 F.2d 742; *United States v. Hill*, 5 Cir., 1970, 430 F.2d 129; *United States v. Rodriquez*, 5 Cir., 1961, 292 F.2d 709.

In *United States v. Skipwith, supra*, the defendant fell within the F.A.A. anti-skyjack profile and stated that he had no identification. A sky marshal detained him and found that the name on his airline ticket was false, took him to his office, and, fearing that a bulge in the defendant's pocket was a gun, had him to empty his pockets, revealing a plastic bag of cocaine. The search was held to be lawful.

In Miss Forbicetta's case, her appearance, method of travel, and response to questions met a "smuggling profile" born of experience gained in coping with that elusive activity. She was at the border, in the act of entering the Country. She was examined by other women in a dignified manner, in a place where there could be no peeping eyes, and there was no exploration of body cavities. This search was entirely reasonable.

The appellant complains of the alleged bias of the trial judge. Counsel did file a motion, 28 U.S.C., §144, that the Judge recuse himself, which was overruled. Despite this unfavorable ruling, jury trial was waived, after the defendant had been very meticulously assured of her right to trial by jury. It is easily seen that counsel adopted this course because the only hope for his client was the asserted illegality of the search. That was a question of law, not a question for a jury.

As an issue of law, and upon undisputed facts, the District Court has decided it correctly.

Nothing remains but for the Judgment of the District Court to be

AFFIRMED.

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APPENDIX B

APPENDIX B

United States Court of Appeals

FOR THE FIFTH CIRCUIT

October Term, 1972

No. 73-1974
Summary Calendar

D. C. Docket No. 72-929-CR-EC

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

SUSAN JILL FORBICETTA,

Defendant-Appellant.

Appeal from the United States District Court for the Southern District of Florida

Before GEWIN, COLEMAN and MORGAN, Circuit Judges.

J U D G M E N T

This cause came on to be heard on the transcript of the record from the United States District Court for the Southern District of Florida, and was taken under submission by the Court upon the record and briefs on file, pursuant to Rule 18;

ON CONSIDERATION WHEREOF, It is now here ordered and adjudg by this Court that the judgment of the said District Court in this cause be, and the same is hereby, affirmed.

September 19, 1973

Issued as Mandate:

APPENDIX C

APPENDIX C

IN THE

UNITED STATES

COURT OF APPEALS

FOR THE FIFTH CIRCUIT

No. 73-1974

SUSAN JILL FORBICETTA,

Appellant

versus

UNITED STATES OF AMERICA,

Appellee

Appeal from the United States District Court
for the Southern District of Florida

PETITION FOR REHEARING
(EN BANC)

JACK FREED
1390 S. Venetian Way
Miami, Florida 33139

Attorney for Appellant

App. 12

INDEX

PETITION FOR REHEARING

CERTIFICATE OF SERVICE

TABLE OF CITATIONS

	Page
Henderson v. United States 390 F.2d 805 (9th Cir. 1967)	2
Santabello v. New York 404 U.S. 257 (1971)	3
United States v. Gilda-Avila 468 F2d 184 (1972)	2
United States v. Gualdalupe-Garza 421 F.2d 876 (9th Cir 1970)	2
United States V. Johnson 425 F.2d 630 (1970)	2
United States v. Poindexter 429 F.2d 510 (1970)	2
United States v. Shields 453 F.2d 1235 (1972)	2

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

NO. 73-1974

SUSAN JILL FORBICETTA,

Appellant,

versus

UNITED STATES OF AMERICA,

Appellee.

Appeal from the United States District Court for the Southern District of Florida

PETITION FOR REHEARING

IN THE INTEREST OF JUSTICE and adherence to the law of the United States of America, Appellant, SUSAN JILL FORBICETTA, by and through her undersigned attorney, respectfully petions this Court for a REHEARING IN BANC, of its decision in this cause and as grounds states:

1. That these proceedings involves questions of exceptional importance.

2. That consideration of the full Court is necessary to maintain uniformity of decisions within this and other UNITED STATES COURTS OF APPEALS and the UNITED STATES SUPREME COURT.

The questions presented in this cause are of exceptional

importance not only because this defendant's Constitutional rights have been openly disregarded in the sole interests of a conviction, but due primarily to the fact that should this decision be permitted to stand in its open conflict and disregard of the Constitution and supporting case law, the Fourth Amendment has,in effect, been rendered null and void.

The reviewing panel in this cause did not address themselves to the questions, the facts or the law in this cause. In their opinion affirming this warrantless strip search the panel cites several recent cases as "an abundance of precedent." These recent cases are of an entirely different nature involving serious and immenent danger to life and property of air travelers by the skyjackers and/or potential skyjackers. Such is not the case in this cause, as no danger, serious or incidental, real or suspected, to life or property was imminent to justify this warrantless strip search.Further, the decision rendered in this cause is in clear and direct conflict with recent decisions on this subject, United States v.Poindexter, 429 F.2d510(1970); United States v. Johnson, 425 F.2d630 (1970); rehearing denied June 22,1970,Henderson v. United States,390 F.2d 805,808 (1967); United States v.Guadalupe-Garza, 421 F.2d 876 (1970); United States v.Gilda Avila, 468 F.2d 184 (1972), United States v. Shields 453 F.2d 1235 (1972), to cite but a few.

The reviewing panel further takes little note of the trial judges open bias to the Defendant and her counsel in denying this Defendant a fair and impartial trial before a fair and impartial judge.Defendant was badgered and threatened by the trial judge during the hearing on Defendant's Motion to Suppress.

Defense counsel exhibited the utmost respect to the court and the judge at all times. The Judge, nonetheless continually badgered counsel, assumed the role of the prosecutor, called counsel a liar, told him he was unfit to practice law, held him in contempt, fined him $100.00 and he was removed by the Marshall to the Marshall's holding area. Clearly unjustified bias which has no place in law or in the dignity of our judicial system.

Furthermore the panel, for whatever reason, apparently places great weight on the waiving of jury by Defendant. Defendant and counsel had no choice but to waive jury trial, as a written stipulation had been entered into and signed by the government, Defendant and defense counsel. (Copy of which is available to this Court) which was honored by the Defendant, but dishonored by the Government. It was during defense counsel attempted proffer to the court of this written stipulation where counsel was held in contempt, called a liar, fined $100.00 and removed by the Marshall. The United States Supreme Court in Santobello v. New York 404 U.S. 257, has expressly held that plea bargaining must be honored by both parties or require that the judgment be vacated.

It is respectfully submitted that the opinion and decision in this cause is not only in direct conflict with the law for it is not the law, hasnever been the law and God forbid should it ever become the law of this great Republic.

Furthermore, for this court of appeals to permit a district court to unjustly treat a citizen and an attorney, (who is an officer of the court) in the manner which they were subjected in this cause

is beyond the law or legal reasoning in establishing that the end, (a conviction), justifies the means, for an illegal warrantless strip search. (Appellants brief sets forth some of the legal authority concerning this cause.)

WHEREFORE, the Court should reconsider its opinion and decision, grant a rehearing En Banc, and reverse the judgment below.

Respectfully submitted,

JACK FREED
Attorney for Appellant
1390 S. Venetian Way
Miami, Florida 33149
305/379-3647

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 2nd of October, 1973, two true and correct copies of the foregoing Petition for Rehearing was hand delivered to the United States Attorney for the Southern District of Florida, Ainsley Building, Miami, Florida 33132.

JACK FREED

APPENDIX D

APPENDIX D

IN THE

United States Court of Appeals

FOR THE FIFTH CIRCUIT

No. 73-1974

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

versus

SUSAN JILL FORBICETTA,
Defendant-Appellant.

Appeal from the United States District Court for the Southern District of Florida

---

ON PETITION FOR REHEARING AND PETITION FOR REHEARING EN BANC

(Opinion Sept. 19, 1973, 5 Cir., 1973, ____ F.2d ____).

(November 2, 1973)

Before GEWIN, COLEMAN and MORGAN, Circuit Judges.

PER CURIAM: The Petition for Rehearing is DENIED and no member of this panel nor Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc, (Rule 35

Federal Rules of Appellate Procedure; Local Fifth Circuit Rule 12) the Petition for Rehearing En Banc is DENIED.

APPENDIX E

APPENDIX E

[illegible]

No. 73-

[illegible]

versus

UNITED STATES OF AMERICA,

Appellee

MOTION TO STAY MANDATE

[illegible]

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 76-[illegible]

[illegible] NAOMI FONSECA,

Appellant,

vs.

UNITED STATES OF AMERICA

Appellee

MOTION TO STAY MANDATE

COMES NOW the Defendant, SUSAN GILL FONSECA, by and through her undersigned attorney, ERICK FRUMP, and moves this Honorable Court to grant this Motion To Stay Mandate and as the grounds therefore says as follows:

1. That a substantial question is to be presented to the Supreme Court in that there is a clear conflict between this Court of Appeals and the United States Court of Appeals for the Ninth Circuit.

The instant case involved a "strip search" at an international border.

The United States Court of Appeals for the Ninth Circuit has clearly and concisely set forth the standards for "strip searches" at an international border, in the following line of cases:

[illegible] v. [illegible], [illegible] F.2d [illegible] (1973) [illegible]
[illegible], [illegible] F.2d [illegible] [illegible] v. [illegible]
[illegible] (1970), [illegible] 22, 1973 [illegible]
S. Ct. 2244, Certiorari was denied 42 U.S.L.W. 3511 [illegible] v.
[illegible], 455 F.2d 1255 (1972) and Fulton Bonner v. [illegible]
F.2d 184 (1972). The decision in the [illegible] cases [illegible]
direct conflict with the decision rendered in the instant case.

The authority cited for the decision in the instant case, [illegible] two anti-hi-jacking cases concerning domestic air travel, has nothing whatsoever to do with "strip searches" of an intestinal nature.

Due to this direct conflict, between different United States Courts of Appeals, this substantial question is to be presented to the Supreme Court. Therefore, it is requested that the Defendant be allowed to remain on the present bond pending determination by the United States Supreme Court.

2. In addition to the foregoing, the United States Supreme Court, in Santabello v. New York, 404 U.S. 257 (1971), at page 267, said as follows:

> "Where the 'plea bargain' is not kept by the prosecutor, the sentence must be vacated..." (emphasis added)

The prosecutor, in the instant case, did not honor a written agreement with the Defendant, which is contrary to [illegible] Santabello, and it is requested that this Defendant be allowed to remain on the present bond pending disposition by the Supreme Court.

[illegible] the defendant respectfully [illegible] honorable Court to grant this Motion to Stay Mandate pending [illegible] tion by the United States Supreme Court.

Respectfully submitted,

[illegible]
[illegible]
[illegible]
[illegible]
305/[illegible]

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the [illegible] day of [illegible], 1974, two true and correct copies of the foregoing Motion to Stay Mandate was hand delivered to the United States Attorney for the Southern District of Florida, Ainsley Building, Miami, Florida, 33132.

JACK [illegible]

APPENDIX F

U.S. COURT OF APPEALS
FILED
NOV 15 '73
EDWARD W. WADSWORTH
CLERK

APPENDIX F
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

UNITED STATES OF AMERICA,
Plaintiff-Appellee,
versus
SUSAN JILL FORBICETTA,
Defendant-Appellant.

NO. 73-1974

ON CONSIDERATION OF THE APPLICATION of the Appellant in the above numbered and entitled cause for a stay of the mandate of this Court therein, to enable Appellant to apply for and to obtain a writ of certiorari from the Supreme Court of the United States. IT IS ORDERED that the issuance of the mandate of this Court in said cause be, and the same is stayed to and including December 2, 1973, the stay to continue in force until the final disposition of the case by the Supreme Court, provided that within the period above mentioned there shall be filed with the Clerk of this Court the certificate of the Clerk of the Supreme Court that certiorari petition has been filed. IT IS FURTHER ORDERED that the Clerk shall issue the mandate upon the filing of a copy of an order of the Supreme Court denying the writ, or upon the expiration of the stay granted herein, unless the above mentioned certificate shall be filed with the Clerk of this Court within that time.

UNITED STATES CIRCUIT JUDGE

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APR 22 1974
MICHAEL RODAK, JR., CLERK

No. 73-853

In the Supreme Court of the United States

OCTOBER TERM, 1973

SUSAN JILL FORBICETTA, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

ROBERT H. BORK,
Solicitor General,
Department of Justice,
Washington, D.C. 20530.

In the Supreme Court of the United States

OCTOBER TERM, 1973

No. 73-853

SUSAN JILL FORBICETTA, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

Petitioner contends that a customs search of her clothing at the airport was improper, that the prosecutor violated a pre-trial stipulation, and that partiality of the trial judge denied her a fair trial.

Following a jury-waived trial in the United States District Court for the Southern District of Florida, petitioner was convicted of importation of cocaine and possession of cocaine with intent to distribute, in violation of 21 U.S.C. 841(a)(1) and 952(a). She was sentenced to three years' imprisonment and three years of special parole on each count, the terms to run concurrently, with immediate eligibility for parole

537-734—74——1

under 18 U.S.C. 4208(a)(2). The court of appeals affirmed (Pet. App. A).

The facts are not in dispute. Petitioner arrived at Miami International Airport on November 21, 1972, on a flight from Bogota, Colombia (R.T. 4, 6). After deplaning and claiming her single suitcase, she entered the customs area and was observed by customs officer Hicks (R.T. 26). While assigned exclusively to the airport for the previous year, Hicks had observed a number of people bringing narcotics into the country (R.T. 22).

Petitioner, a trim, attractive, young woman, was apparently traveling alone, had one bag, and stated that she had no liquor or other items requiring declaration (R.T. 26, 29). She was wearing a loose-fitting dress (R.T. 27), and when she bent over to pick up her suitcase Hicks observed that "you couldn't really see her figure." Hicks became "immediately suspicious of a young lady wearing a kind of a loose dress because my experience has shown that they are either carrying something or possibly concealing something * * *" (R.T. 27–28). After she passed through the customs line, Hicks questioned her. She said she had been in Bogota, Colombia, for about ten days on vacation to see a friend, but had no relatives there. She said she was an unemployed bank teller, and her passport listed her home as Brooklyn, New York (R.T. 29–31).

Hicks and other agents had noted a pattern of narcotics traffic from Bogota into Miami, in which large quantities of narcotics were smuggled by air from Bogota by young girls, usually wearing loose-fitting

clothing and traveling alone with little luggage and nothing to declare (R.T. 22–25). Moreover, Bogota is not considered a likely destination for vacationing young people, especially those with little money (R.T. 26, 31–32). He therefore asked petitioner to step into a windowless office for a private examination by two female customs inspectors (R.T. 31, 46). At the request of one of them, petitioner lifted her dress, revealing a slip (R.T. 9, 46, 47). The female inspectors could easily see something concealed under her girdle (R.T. 47, 51). The girdle was discovered to contain seven packets of white powder weighing about 2½ pounds. It was stipulated at trial that the powder was subsequently tested and found to be cocaine (R.T. 49, 52, 106).

1. Petitioner contends that the decision in this case conflicts with Ninth Circuit cases requiring a "real suspicion" on the part of customs agents before a "strip search" can be conducted. This Court has long ruled that border searches by customs officials are not governed by the usual Fourth Amendment standard of "probable cause," since the crossing of an international border provides sufficient reason to permit a search for aliens or contraband. *Carroll* v. *United States*, 267 U.S. 132, 154; *Boyd* v. *United States*, 116 U.S. 616, 623. See *United States* v. *McDaniel*, 463 F. 2d 129, 132 (C.A. 5); *Murgia* v. *United States*, 285 F. 2d 14 (C.A. 9); *Landau* v. *United States Attorney*, 82 F. 2d 285, 286 (C.A. 2). The Ninth Circuit has ruled that before a "strip search" may be made, there must be a "* * * subjective suspicion supported by objec-

tive, articulable facts that would reasonably lead an experienced, prudent customs official to suspect that a particular person seeking to cross our border is concealing something on his body for the purpose of transporting it into the United States contrary to law," *United States v. Guadalupe-Garza,* 421 F. 2d 876, 879 (C.A. 9.) See *Henderson* v. *United States,* 390 F. 2d 805, 808 (C.A. 9); *United States* v. *Johnson,* 425 F. 2d 630 (C.A. 9), certiorari dismissed, 404 U.S. 802. Here, the customs officer asked the female agents to conduct a private search only after observing petitioner's unusual appearance and determining the correlation between her Bogota trip and the pattern of narcotics traffic from Bogota to Miami. In such circumstances, Officer Hicks' suspicions were supported by "objective, articulable facts."

2. Petitioner also contends that the failure of the prosecution to adhere to a pretrial stipulation requires vacation of sentence under *Santobello* v. *New York,* 404 U.S. 257.

The circumstances surrounding the stipulation are as follows. After the suppression hearing and denial of petitioner's motion to suppress, defense counsel requested and the prosecutor agreed that the government's testimony at the suppression hearing would be proferred at trial as part of the government's case-in-chief. Defense counsel, on petitioner's behalf, also advised that petitioner would waive jury trial. This waiver of jury trial was prompted both by defense counsel's belief that there would be little other than the question of the chain of custody of the seized

cocaine for jury determination, and also by defense counsel's desire to avoid further strain and expense for his client (R.T. 71). The stipulation concluded with the following statement signed by prosecutor Ullman:

> I will recommend $2500 surety bond pending appeal and sentence of two years jail, if the P[re]S[entence]I[nvestigation] does not show anything unfavorable to the [defendant]. Tho[ugh] just a recommendation; the c[our]t may give up the maximum.[1]

At sentencing, the court called upon defendant and counsel to speak in mitigation and, without calling upon the prosecutor, imposed a three year sentence and set bond at $10,000 (R.T. 115–119). When defense counsel (R.T. 118–120) and prosecutor Boswell (R.T. 121) referred to the stipulation, the court called defense counsel a liar, fined him $100 (R.T. 119), and informed Boswell: "[Y]ou have no business making special agreements because I do not recognize them" (R.T. 121). Thereupon, Boswell explained that it was his understanding that the government's agreement was predicated upon an agreement by petitioner to enter a guilty plea (R.T. 122).

Here, unlike *Santobello,* there was no plea bargaining and guilty plea. Rather, petitioner was convicted after voluntary waiver of jury trial (R.T. 68–71). Nor

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[1] This stipulation is not part of the record. However, we have been informed that petitioner has accurately described the contents of the stipulation (Pet. 4). We are lodging with the Clerk of this Court a copy of the stipulation furnished to us by petitioner's counsel.

did Boswell's erroneous statement that the stipulation was conditioned upon a plea of guilty by petitioner affect petitioner's sentence or bond, since the court had already imposed sentence and fixed bond. Moreover, the court made it clear that it would not even consider any such agreement entered by defense counsel and the government.

3. Finally, petitioner contends that the court's animosity toward her attorney deprived her of a fair trial. As the court of appeals noted (Pet. App. 4), the case turned on a question of law, the reasonableness of the customs search. As that issue was unquestionably resolved in a proper manner, any personal animus toward the attorney could not have been prejudicial to petitioner.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

ROBERT H. BORK,
Solicitor General.

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Supreme Court, U. S.
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in the

Supreme Court

of the

United States

OCTOBER TERM 1973

No. 73-853

SUSAN JILL FORBICETTA,
Petitioner,

vs.

UNITED STATES OF AMERICA,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

PETITIONER'S REPLY TO RESPONDENT'S MEMORANDUM IN OPPOSITION

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Respondent in his memorandum in opposition sets forth a line of cases involving a "border search" and/or a search incident to a lawful arrest, however, such is not the case here, as the instant case involves, pure and simple, the infinitely greater indignity of a "strip search" at the

border. Therefore, it becomes necessary to distinguish respondent's lines of cases from the facts in the instant case. In an effort to clearly and concisely set forth these distinguishing facts, the following is respectfully submitted.

1. Respondent cites *Carroll v. United States*, 267 U.S. 132, 154 (1925)

A. Facts:

1. Involved a domestic search of an automobile and subsequent seizure of contraband whiskey and gin.

2. The stopping and searching of the automobile was predicated on personal knowledge of government agents that the defendants were engaged in illegal transportation of contraband, and that the automobile stopped and searched was the same automobile used by these same defendants on a previous occasion while engaging in this illegal activity.

B. Conclusion:

1. The Supreme Court upheld the search and seizure as proper as there was probable cause.

C. Facts as they relate to instant case:

1. There can be no reasonable correlation between the facts in *Carroll, supra,* and the instant case for the following reasons:

a. *Carroll, supra,* involved a domestic search of a possession, a car, and was based on previous personal knowledge of the government agent — conversely the instant case involving the infinately greater indignity of the strip search of the person and without previous personal knowledge of the agents.

b. *Carroll, supra,* — the stopping and searching of the automobile was predicated on the agent's personal knowledge about and directed to this specific defendant and this specific automobile — Conversely the instant case reveals no such showing of facts directed specifically to this defendant. Indeed, the record clearly shows, the absence of any subjective articulable facts directed specifically to this defendant. The record reveals only vague generalizations which can be reasonably attached to a very large body of our citizenry.

2. Respondent, cites *Boyd vs. United States,* 116 U.S. 616, 623 (1886).

A. Facts:

1. Defendants, by district court order were required to produce certain documents relating to quantity and value of certain cases of plate glass.

2. Defendants contend this violated the fourth amendment against unreasonable search and seizure and the fifth amendment prohibiting the compelling of a defendant to be a witness against himself.

B. Conclusion:

1. The Supreme Court reversed and remanded this cause for a new trial, on the basis of the fourth and fifth amendments and held, inter alia, that all searches and seizures are not abolished by the fourth amendment, only unreasonable search and seizures are forbidden.

C. Facts as they relate to instant case:

1. There can be no correlation of the facts in Boyd, supra, and the facts in the instant case, since no strip search was involved. There is, however, a setting out by reaffirmation, the principle that all searches and seizures are not abolished by the fourth amendment, only unreasonable search and seizure, therefore, it becomes necessary to dwell on the unreasonableness of the "strip search" in the instant case.

a. Respondent contends that the strip search of the defendants person in the instant case falls within a border search and is, therefore, not governed by the usual fourth amendment standard of "probable cause". Conversely, it is difficult to see how respondent, in view of the recent district courts of appeals decisions involving strip searches can arrive at this conclusion. *Henderson v. United States,* 390 F.2d 805, 808 (1967); *United States v. Guadalupe-Garza,* 421 F.2d 876 (1970); *United States v. Johnson,* 425 F.2d 630 (1970); rehearing denied June 22, 1970, Certiorari Granted, 91 S.Ct.

2294, Certiorari dismissed, 92 S.Ct. 38; *United States v. Shields*, 453 F.2d 1235 (1972); *United States v. Gilda-Avila*, 468 F.2d 184 (1972) and *United States v. Williams*, 459 F.2d 44 (1972). Furthermore, a possible border search of effects and/or automobile of one seeking entry into this country is a well established pre-requisite to entry. However, nothing leads a person to anticipate that upon reaching our border, he will be singled out, removed to a private examination room, ordered to disrobe and suffer the outlandish indignity of a strip search. As the Court in *United States v. Guadalupe-Garza*, 421 F.2d 876 (1970) in touching on this subject stated

> ". . . no one should be subjected to the indignity of such a search unless there are compelling reasons to do so."

3. Respondent cites, *United States v. McDaniel*, 463 F.2d 129, 132, (1972).

A. Facts:

1. Defendant was stopped and his car searched for aliens some seven miles north of Laredo, Texas. Border patrol agents had decided, prior to this search, to search every vehicle passing the border that night for aliens. Incident to the search for aliens, upon defendant opening the trunk of his automobile, agents spotted four large burlap bags covered with a Guadalajara, Mexico, newspaper. Defendant in response to agents question, stated

that the bags contained alfalfa. Upon further request by agent, defendant opened the bags, agent felt and smelled what appeared to him to be marijuana. Subsequently, defendant was arrested, tried and convicted for violation of narcotic laws.

B. Conclusion:

The United States Circuit Court of Appeals, in affirming the judgment of the District Court concluded that the search of the vehicle was legally proper in that, inter alia, the car was reasonably stopped pursuant to an authorized border search for aliens and the agents are empowered to conduct such search of the car, including, the trunk, for aliens entering the country illegally. The discovery of the contraband marijuana was incident to the authorized border search of a vehicle.

C. Facts as they relate to instant case:

1. There is no correlation in the facts of the McDaniel case, supra, and the instant case for the following reasons:

a. McDaniel, supra, is pure and simple, a border search of a vehicle for aliens attempting to enter the country illegally. Incident to the vehicle search, contraband marijuana was discovered. Conversely, the instant case involves the singling out of one person, and the removing that person to a private examination room to suffer the indignity of disrobing and "strip search".

4. Respondent cites, *Murgia v. United States,* 285 F.2d 14 (1960)

A. Facts:

Defendant Murgia upon entering the United States from Mexico on foot, registered as a narcotics addict, a fact well known to customs agents at this point of entry, and without being subjected to a border search was permitted to enter. A customs agent followed defendant on foot approximately four blocks, whereupon defendant was observed entering a car which contained three other persons, one of which was known to the customs agent as a convicted narcotics violator. The observing customs agent was then picked up by another customs agent in a government car and they together followed the car in which defendant had entered. The officers followed the car through the city of Calexico and approximately one to one and one-half miles outside the city, at which point they sounded the siren on the government vehicle. The siren was still being sounded when an arm extended from the right side of defendants car and an object was thrown out of the car. Defendants car stopped and all occupants were lined up and searched for weapons. One officer retrieved the object thrown from defendants car. This object proved to be a narcotic addicts kit. All four occupants of defendants car were placed under arrest, returned to the customs house and interrogated independently. One, Mr. Lilly, confessed and implicated the other three defend-

ants. Lilly further informed agents that defendant Murgia presently had narcotics concealed in his rectum. Subsequent examination by a doctor at the El Centro County hospital revealed that defendant did have narcotics in his rectum as stated by Lilly.

B. Conclusion:

This case involves a "border search" which resulted in the arrest of four defendants. Subsequent to the lawful arrest and interrogation of defendants, defendant Murgia, based upon information supplied by his then codefendant, was further searched and narcotics were found in his rectum. Murgia's "strip search" was incident to a lawful arrest and based further on information supplied by his then codefendant.

C. Facts as they relate to instant case:

1. There can be no correlation of the Murgia case, supra, to the instant case for the following reasons:

a. In Murgia, supra, the initial stopping of defendants automobile was for a "border search". Incidents occurring during the stopping of the automobile resulted in the arrest of defendant. Save for a search for weapons, no search of the defendants was made prior to arrest, and therefore all searches were conducted as incident to said arrest. Conversely, in the instant case the search was not

incident to a lawful arrest nor was there information supplied by a codefendant.

5. Respondent cites, *Landau v. United States* Attorney, 82 F.2d 286 (1936)

A. Facts:

In this case, the defendant's personal effects were subjected to a thorough border search while reentering the country. The search was conducted, based upon confidential information to customs officials, that defendant was involved in an attempt to smuggle swiss watch movements into the country. While in the process of being transported to a customs house defendant removed a memorandum from his brief case and put it in his pocket. The customs agent took the memorandum from him and found it contained a list, in the defendant's handwriting, showing the watch movements to be smuggled into the country.

B. Conclusion:

The Circuit Court of Appeals, Second Circuit, found that this was a lawful seizure of the subject memorandum as said memorandum was an instrumentality of crime.

C. Facts as they relate to instant case:

There can be no correlation in the facts of the Landau case, supra, and the instant case in that:

1. Landau, supra, was a "border search" of defendants baggage and was principally initiated by information supplied by a confidential informer that defendant was involved in an attempt to smuggle goods into the country. Conversely, in the instant case, we find not a "border search" of personal effects based on previous confidential information but a strip search without previous confidential information.

The foregoing cases have nothing whatever to do with the singling out of a person crossing our international border and subjecting that person to a "strip search". The standards necessary to subject a person to this infinitely greater indignity of "strip search" at an international border has been set forth by the Ninth Circuit Court of Appeals, a Circuit which has heretofore heard and decided more cases of this subject than any other Circuit Court of Appeals. See *Henderson v. United States*, 390 F.2d 805, 808 (1967); *Murgia v. United States*, 285 F.2d 14 (1960); *United States v. Guadalupe-Garza*, 421 F.2d 876 (1970); *United States v. Johnson*, 425 F.2d 630 (1970), rehearing denied June 22, 1970, Certiorari granted 91 S.Ct. 2294, Certiorari dismissed 92 S.Ct. 38, *United States v. Shields*, 453 F.2d 1235 (1972); *United States v. Gilda-Avila*, 468 F.2d 184 (1972) and *United States v. Williams*, 459 F.2d 44 (1972).

In *United States v. Johnson*, supra, "a case on all fours", the United States Circuit Court of Appeals, Ninth Circuit, in dealing with the subject of a border "strip search" reversed the findings of the Trial Court which

denied Defendant's Motion to Suppress. The facts of the Johnson case, supra, are as follows:

> "The prosecution called two witnesses at the hearing on defendant's motion to suppress. The first, Richard L. McCown, testified that he was a customs inspector stationed at San Ysidro, California, that he had considerable experience in examining persons crossing the border for narcotics, and that on August 18, 1968, he had observed defendant and a female companion entering the United States by foot, had talked with them, and had then requested a female Customs agent to search defendant. Government counsel then asked, "Were you suspicious before you made that request?"; and Inspector McCown replied, "I was, yes, sir."
>
> The prosecution's second witness was Netta W. Lohman, a part-time Customs inspectress. She testified that she had conducted the strip search of defendant and had found the heroin in question hidden in defendant's panties. No further testimony was presented.
>
> The trial judge dismissed defendant's motion, stating, "I cannot see where one can differentiate between the various degrees of suspicion, if an experienced police officer of some twenty-seven years of experience as Mr. McCown has, suspects enough to request a female Customs agent to search it seems to me is is a real suspicion."

The facts of the instant case reveal that Susan Forbicetta arrived at the Miami International Airport on a flight from Bogota, Columbia. Customs officer Hicks testified she was apparently traveling alone, had one suitcase, had no liquor, was wearing a loose-fitting dress and when she bent over you couldn't really see her figure. Hicks questioned her and she said she had been in Bogota, Columbia, for about ten days on vacation to see a friend, but had no relatives there, and that she was an unemployed bank teller. The Defendant was then singled out and removed to a private examination room for a private examination. She was subjected to a strip search and Cocaine was found in her girdle. Officer Hicks testified that he was employed as a customs patrol officer for approximately one year and three months.

The foregoing facts are generalizations, common to many persons crossing our international borders and are not articulable facts directed specifically to this Defendant which would lead an experienced prudent customs official to suspect that she was carrying contraband on her person, and as such, fails to meet the standard of "real suspicion" as required by the Ninth Circuit Court of Appeals.

In *United States v. Johnson,* supra, the Court said:

> "In Henderson v. United States, 390 F.2d 805, 808 (9th Cir. 1967), we held that the forced disrobing of a person entering the country violated the Fourth Amendment unless there was "at least a real suspicion, directed specifically to that person."

In Guadalupe-Garza, Judge Hufstedler wrote:

"[N]either *Henderson* nor our decisions following it have further defined the 'real suspicion' test stated there. We do so now.

'Real suspicion' justifying the initiation of a strip search is subjective suspicion supported by objective, articulable facts that would reasonably lead an experienced, prudent customs official to suspect that a particular person seeking to cross our border is concealing something on his body for the purpose of transporting it into the United States contrary to law.

The objective, articulable facts must bear some reasonable realtionship to suspicion that something is concealed on the body of the person to be searched; otherwise, the scope of the search is not related to the justification for its initiation, as it must be to meet the reasonableness standard of the Fourth Amendment. (Cf. Terry v. Ohio, supra, 392 U.S. 1 at 29, 88 S.Ct. 1868, 20 L.Ed.2d 889; Warden Md. Penitentiary v. Hayden (1967) 387 U.S. 294, 310, 87 S.Ct. 1642, 18 L.Ed.2d 782 (Mr. Justice Fortas, concurring).)" 421 F.2d at 879.

[2, 3] There are no "objective, articulable facts" in the record to support Inspector McCown's sus-

> picion. "If such facts existed, it was incumbent upon the government to prove them.[2]"
>
> And, of course, the discovery of contraband in defendant's underclothing does not validate the search. United States v. Di Re, 332 U.S. 581, 595, 68 S.Ct. 222, 92 L.Ed. 210 (1948)."

The Circuit Court of Appeals, Fifth Circuit, in their affirming opinion in the instant case, completely and totally disregarded the foregoing line of cases.

Furthermore, the Fifth Circuit in their affirming opinion, refers to something called a "smuggling profile". As authority for this, that Court, cited anti-skyjack cases, involving domestic baggage searches and airport security, wherein an "anti-skyjack profile" was mentioned. This is in direct conflict with the standard as established by the line of cases from the Ninth Circuit.

Respondent in its memorandum in opposition to Petitioners' Petition for Writ of Certiorari set out bald generalizations of customs patrol officer Hicks which they would have this Court believe has met the test of "real suspicion" as established by the Ninth Circuit. This simply is not true. These bald generalizations are simply that,

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[2]United States v. Jeffers, 342 U.S. 48, 51, 72 S.Ct. 93, 96 L.Ed. 59 (1951); McDonald v. United States, 335 U.S. 451, 456, 69 S.Ct. 191, 93 L.Ed. 153 (1948); Cohen v. Norris, 300 F.2d 24, 32 (9th Cir. 1962); Cervantes v. United States, 278 F.2d 350, 353 (9th Cir. 1960); Wrightson v. United States, 95 U.S.App. D.C. 390, 222 F.2d 556, 558 (1955); 3 Wright, Federal Practice & Procedure § 675, at 126-27 (1969 ed); *see also* Bumper v. North Carolina, 391 U.S. 543, 548, 88 S.Ct. 1788, 20 L.Ed.2d 797 (1968); United States v. Vickers, 387 F.2d 703, 106 (4th Cir. 1967).

"Generalizations". True, they may have aroused the curiosity of customs patrol officer Hicks. (T 36, 37 & 40). However, curiosity is not enough and can hardly be said to even remotely comply with the test of "real suspicion" as set forth in *United States v. Johnson*, Supra.

Nowhere, does the record reveal any showing of "real suspicion" supported by subjective, articulable fact directed to this specific person. Nowhere, has the government met the requirement, and if such facts existed, it was incumbent upon the government to prove them. Certainly the generalizations set forth that aroused the curiosity of custom patrol officer Hicks fail to meet this requirement in every regard, for as he himself states, his state of mind was simply curiosity. (T 36, 37, 40).

Reply to Number 2 of Respondent's Memorandum

In reply to Number 2 of Respondent's Memorandum, regarding the pretrial stipulation agreement (plea bargain agreement), the following is respectfully submitted.

There can be no question as to the existence of such agreement, as it was in writing and has now been lodged with the Clerk of this Court.

At the time of sentencing a different prosecutor appeared and did not honor the agreement but remained silent while the sentence was being imposed, instead of making the agreed recommendations. When Defense Counsel tried to proffer the agreement to the Court, the new prosecutor made the erroneous statement that:

> "Mr. Boswell: Yes, sir. What I wanted to say is that it was my understanding about this was that this was if there were a guilty plea." (T-122)

The truth of the matter is, that the government made a promise to recommend a $2,500 surety bond pending appeal and sentence of two years. The government did not keep their promise and made the aforesaid erroneous statement.

The government has now admitted, in the memorandum in opposition filed by the Solicitor General (at page 6) that this was an erroneous statement.

In *Santobello v. New York,* 404 U.S. 257, The Supreme Court of the United States granted Certiorari to determine whether the State's failure to keep a commit-

ment concerning the sentence recommendation on a guilty plea required a new trial. The Supreme Court, at page 257,

> "Held: The interest of justice and proper recognition of the prosecution's duties in relation to promises made in connection with 'plea bargaining' require that the judgment be vacated . . ."

In the *Santobello* case, as in the case at bar, a different prosecutor appeared at sentencing and failed to honor the agreement. The Court went on to say, at page 262,

> "The staff lawyers in a prosecutor's office have the burden of 'letting the left hand know what the right is doing' or has done."

At page 266, the Court in citing other cases, said:

> "The lower courts, however, have uniformly held that a prisoner is entitled to some form of relief when he shows that the prosecutor reneged on his sentencing agreement made in connection with a plea bargain, most jurisdictions preferring vacation of the plea on the ground of involuntariness, . . . As one author has stated, the basis for outright vacation is 'an outraged sense of fairness when a prosecutor breaches his promise in connection with sentencing'."

At page 267, the Court went on to say,

> "Where the 'plea bargain' is not kept by the prosecutor, *the sentence must be vacated . . .*" (Emphasis added)

Based on the promises or inducements of the prosecutor the defenses gave up their constitutional right to trial by jury; agreed to stipulate that evidence was cocaine so that agent (chemist) would not have to travel from Georgia and that the testimony of the Motion to Suppress would be adopted at the time of trial. All of the above was honored by the defense, but breached by the prosecution and just like *Santobello,* supra, this was a clear case of a broken promise — of the very condition on which the agreement was obtained.[1]

[1]Since the government, in their memorandum in Opposition (at page 6) makes reference to the affirming Opinion of the Court of Appeals, Petitioner feels it is appropriate to mention that the Court of Appeals, in their affirming, did not address themselves to the question presented regarding the pre-trial agreement, although argument and law (Santobello) was presented.

Their opinion made no reference whatsoever to the breach of the pre-trial stipulation.

Reply to Number 3 of Respondent's Memorandum

In reply to Number 3 of Respondent's Memorandum, regarding unfair trial, the following is respectfully submitted.

One of the basic fundamental principles set forth in the Constitution of the United States is that all persons shall be provided with due process of law, and as such, shall be entitled to a fair and impartial trial before a fair and impartial judge.

In *Knapp v. Kinsey*, 232 F.2d 458 (1956), the United States Court of Appeals, Sixth Circuit, in a detailed and very learned opinion, among other things, stated:

> "One of the fundamental rights of a litigant under our judicial system is that he is entitled to a fair trial in a fair tribunal, and that fairness requires the absence of actual bias or prejudice in the trial of the case. . . . *If this basic principle is violated, the judgment must be reversed.*" (Emphasis added)

In re Murchison, 349 U.S. 133, 136, 75 S.Ct. 623, 99 L.Ed. 942, the Court stated:

> *"A fair trial in a fair tribunal is a basic requirement of due process."* (Emphasis added)

In the instant case, the facts, as shown by the record, reveals that the defendant did not receive a fair and impartial trial by a fair and impartial Judge. In reviewing the record during defendants' Motion to Suppress (R-144) it becomes abundantly clear that the trial judge did not

conduct the proceedings in a fair and impartial manner so as to afford the defendant due process of law. During the proceedings when counsel would attempt to bring good and substantial law to the attention of the Court, the trial judge, in displaying hostility, would belittle, unnerve, badger, accuse and threaten defense counsel to the point of denying defendant representation or due process of law and further threatened the defendant, who was under oath, with perjury charges, if she did not tell the truth.

To indisputably establish the foregoing, one need only examine the transcript (T-1 through 124) and more specifically that part wherein the Court in cross examining the defendant during Motion to Suppress (T-12, 13) where the following exchange with defense counsel transpired:

> "The Court: I think she was paid. You know the mule deal? You are familiar with that?"
>
> "Mr. Freed: I am familiar with what you are trying to get at, your Honor."
>
> "The Court: Then I want to get at it and I want her to tell the truth, otherwise she will be subject to perjury charges."
>
> "Mr. Freed: Yes, I understand all of that, but this is a Motion to Suppress, and I believe the issue here is whether or not . . ."
>
> "The Court: I am suppressing you now, because you are aiding and abetting in narcotics trade."

"Mr. Freed: No, I am not. I do not feel that way."

"The Court: I think so, because you are concealing facts."

"Mr. Freed: I am not concealing facts, your Honor."

"The Court: Well, you are."

"Mr. Freed: No sir."

"The Court: Well, we will look into it in your case, then, if that is the circumstance."

"Mr. Freed: Yes, your Honor."

The foregoing exchange occurring during the very early part of the hearing, before any government testimony was offered, clearly demonstrates the prejudicially biased attitude, and the open hostility of the trial judge in belittling, unnerving, badgering, accusing and threatening the defendants counsel. In the case of *Knapp v. Kinsey*, 232 F.2d 458 (1956) supra, the Circuit Court of Appeals, Sixth Circuit stated:

> *"In re Murchison*, 349 U.S. 133, 136, 75 S.Ct. 623, 625, 99 L.Ed. 942, the Supreme Court said 'Fairness of course requires an absence of actual bias in the trial of cases. But our system of law has always endeavored to prevent even the probability of unfairness.' In Whitaker v. McLean,

> 73 App. D.C. 259, 118 F.2d 596 the Court said — '*Hostility is a form of bias.* . . . The policy . . . is that the courts of the United States 'shall not only be impartial in the controversies submitted to them but shall give assurance that they are impartial'; i.e. shall appear to be impartial." (Emphasis added)

In the instant case we find a record that is replete with the trial courts prejudicially biased actions and statements toward the defendants counsel. The exchange between the Court and defense counsel hereinabove noted during the Motion to Suppress is but one instance, to continue, during the trial. The following exchange, again between the Court and defense Counsel transpired (T 103-107):

> "Mr. Freed: I would also like to object to the admissibility of the evidence on the basis that the search, and particularly the search of this defendant, was an unreasonable search in violation of the Fourth Amendment of the U.S. Constitution. Mr. Hicks testified previously that he could not make out — In fact, you recall his testimony, your Honor."
>
> "The Court: She had a loose dress on and no bumps appeared as bumps under the dress."
>
> "Mr. Freed: Right, and he named a few things, the fact that she was single, and the fact that she was going to Bogata, but that it made him curious.
>
> I submit under the law, curiosity is not enough.

The cases, even of the Fifth District cases and in particular the Ninth District cases have laid down certain reasonableness tests."

"The Court: We have discussed that before and I have ruled."

"Mr. Freed: I do not feel the form of strip search that the Government made has met the burden."

"The Court: There have been thousands that did find something."

"Mr. Freed: There certainly should be a standard, more than curiosity."

"The Court: I do not think the United States has gone out of business yet. They are pretty near out of business because of the silly rules of some courts, but I do not follow those rules."

"Mr. Freed: I have nothing further, your Honor."

"The Court: By the way, there was a test search, you remember.

An agent made a search before he removed that stuff."

"Mr. Freed: That was after the search."

"The Court: I say, there is no substantial decision to indicate that search was wrong."

"Mr. Freed: There are seizures —

"The Court: Ridiculous decisions, but that is not unusual."

"Mr. Freed: There are decisions that are available for the Court."

"The Court: They sustain it."

This was certainly reasonable. Here is a woman going some place without any business down there, without any money."

"Mr. Freed: Who is to determine what she can do and what she cannot do?"

"The Court: Here is this woman going to a country without a job, without acquaintances, without anything and going through a procedure that is followed by hundreds of narcotic peddlers. And if the customs did not do that search reasonably as they did in this case, they would be terribly neglect. We could get rid of them and save some money."

"Mr. Freed: I understand your Honor's views and I respect them, but I submit under case law it has not met the reasonable test."

"The Court: Then you expect the Government to go to pieces."

"Mr. Ullman: Your Honor, will Government's Exhibit 1 be received in evidence?"

"The Court: Be Received."

"Mr. Ullman: The one last thing before the Government rests is counsel for the defense as stipulated that the contents of each of the seven bags was submitted for a chemical analysis to the U.S. chemist in Savannah, Georgia and they determined the contents of each said bags to be cocaine fifty percent pure.

"The Court: Is that right, counsel?"

"Mr. Freed: I agreed. I would agree to that so that they would not have to come down from Georgia; that it is cocaine."

"Mr. Ullman: Your Honor, the Government rests."

"The Court: Do you have anything?"

"Mr. Freed: Yes, your Honor.

At this time, I would like to move for a directed verdict."

"The Court: Be denied on the same grounds."

During the sentencing the following exchange transpired: (T 118-119).

"Mr. Freed: Your Honor, I would like the record to reflect that prior to waiving the jury trial, the defense attorney and the United States Government entered into an agreement where —

"The Court: I told you and you do not lie here in front of me or you will get held in contempt."

"Mr. Freed: I am not lying in front of you."

"The Court: Well, you are lying just as sure as you are standing there."

"Mr. Freed: I am just telling you that the United States Government —

"The Court: You made an agreement and I have told you three times, no agreement in this Court."

"Mr. Freed: I do not believe you told me three times. I just wanted you to be aware that they said they would recommend —

"The Court: All right. A hundred-dollar fine for you. You are, in my opinion, a liar and unfit to practice law here.

Further, during the same proceedings (T 121-122), the following exchange occurred between the Assistant United States Attorney, the Court and defense counsel:

"Mr. Boswell: Your Honor, I would like the record to reflect that it is my understanding in discussing this with the United States Attorney who

is in charge of this case that such an agreement as Mr. Freed referred to was —

"The Court: Well, you have no business making special agreements because I do not recognize them."

"Mr. Boswell: I understand, Judge Choate. I wanted to say that I understood —

"The Court: But he just quoted you as making a special agreement just now."

"Mr. Boswell: Yes, sir. What I wanted to say is that it was my understanding about this was that this was if there was a guilty plea."

"The Court: Well, he did not say that. You heard him."

"Mr Freed: That is not true. I would like the record to reflect that we waived a jury trial and the Government said they would recommend, recommend $2,500 . . ."

"The Court: Now you have changed your story a little bit."

"Mr. Freed: I have not changed it. I have it in writing, your Honor. It says here, 'I will recommend . . .' It is signed by the U.S. Attorney, '. . . a $2,500 surety bond pending the appeal.' "

Mr. Ullman, the Government prosecutor utilized the stipulation to waive jury and adopt testimony from Motion to Suppress (T 67, 71, 72 and 106).

Mr. Ullman stated (T-67)

> "Mr. Ullman: We had the hearing on the Motion to Suppress the other day and your Honor denied the Motion. Counsel now wishes to proceed to trial and waives jury and proceeds non-jury and to adopt the testimony the Government offered recently at the hearing on the Motion to Suppress. The Government will have one additional matter of evidence to present."

Mr. Ullman stated (T 71-72)

> "Mr. Ullman: Your Honor, *pursuant to a stipulation* between Mr. Freed and myself, an agreement between Mr. Freed and myself, The Government now moves for the introduction of all that testimony which the Government elicited during the hearings on the Motion to Suppress recently held before your Honor." (Emphasis added)

Mr. Ullman mentioned the above stipulation and used it to introduce certain testimony and used it again (T 106-107) when he mentioned the stipulation again to introduce contraband without chemist, per the stipulation.

The stipulation that was mentioned and used by Mr. Ullman during the trial was not honored by the Govern-

ment at the time of sentencing. A different Government Prosecutor appeared and said, (T-121)

> "Mr. Boswell: Your Honor, I would like the record to reflect that it is my understanding *in discussing this with the United States Attorney who is in charge of this case* that such an agreement as Mr. Freed referred to was..." (Emphasis added)

Mr. Boswell stated (T-122)

> "Mr. Boswell: Yes Sir. What I wanted to say is that it was my understanding about this was *that this was if there were a guilty plea.*" (Emphasis added)

The above mentioned stipulation was utilized by the Government, but not honored by the Government. When defense counsel tried to appraise the Court of the Stipulation Agreement, the Court held defense counsel in contempt, fined him one hundred ($100.00) Dollars, called him a liar and said he was unfit to practice law here, (T-118, 119, 120, 121 and 122) among other things.

Certainly the foregoing record, argument and law, leaves no question as to a separate issue of "unfair trial" and the fact that the Respondent stated in the memorandum at page six, referring to the question of the reasonableness of the custom search, said

> "As that issue was unquestionably resolved in a proper manner, any personal animus towards the

attorney could not have been prejudicial to petitioner."

That statement simply is not true.

It is respectfully submitted that the Writ of Certiorari should be granted.

Respectfully submitted,

/s/ Jack Freed

JACK FREED
Attorney for Petitioner
1390 South Venetian Way
Miami Beach, Florida 33139
305/379-3647

CERTIFICATE OF SERVICE

I, JACK FREED, attorney for Petitioner, hereby certify that I have this 2nd day of May 1974, served by Air Mail three printed copies of the foregoing Reply to Memorandum in Opposition to the United States Court of Appeals for the Fifth Circuit; three printed copies to the Solicitor General, Department of Justice, Washington, D.C. 20530 and three printed copies, by regular mail to Robert Rust, United States Attorney for the Southern District of Florida, at 14 N.E. 1st Avenue, Suite 300 Ainsley Building, Miami, Florida, 33132.

/s/ Jack Freed

JACK FREED

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in the

Supreme Court

of the

United States

OCTOBER TERM, 1973

No. 73-853

SUSAN JILL FORBICETTA,
Petitioner,

vs.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR REHEARING

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

---

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Attorney for Petitioner
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305/379-3647

S. FOWLER & CO., INC. — 625-7663 — 525-3351

CERTIFICATE

This is to certify that the foregoing Petition for Rehearing is meritorious and is presented in good faith, and not for the purposes of delay. It is further certified that this Petition for Rehearing is restricted to the grounds herein presented.

Respectfully submitted

/s/ Jack Freed

JACK FREED
Attorney for Defendant
1390 So. Venetian Way
Miami, Florida 33139
305/379-3647

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PETITION FOR REHEARING

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

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Pursuant to Rule 58, Supreme Court of the United States Revised Rules, effective July 1, 1970, the Petitioner files this Petition for Rehearing and as grounds therefore says:

1. The United States Court of Appeals for the Fifth Circuit did not rule on the question of the government reneging on the written pretrial stipulation agreement.

2. That intervening circumstances, subsequent to filing the Petition for Writ of Certiorari, make the validity of the agreement uncontrovertible and the reneging of the agreement, by the government, equally uncontrovertible.

3. That due to the foregoing (1 & 2) an untenable situation now exists, which inhibits the orderly administration of the law and must not be permitted to stand.

STATEMENT OF FACTS

Prior to trial the government and defense entered into a written agreement whereby the defendant would waive the constitutional right to a jury trial; adopt the testimony from the Motion to Suppress hearing, so that the government witnesses would not have to come back to testify; and agreed to the introduction of the evidence so that the government would not have the expense of bringing the chemists from Savannah, Georgia to testify. The government agreed that if the defendant was convicted, the government would recommend a maximum of two years and a $2,500.00 surety bond, pending appeal. *The defendant completely honored the agreement,* in that, at trial as agreed the defense waived the constitutional right to a jury trial; the testimony from the Motion to Suppress hearing was adopted; the contraband was admitted; and the testimony of the chemist was waived. The Defendant was convicted. *The government completely dishonored the*

agreement. At the time of sentencing, a different prosecutor appeared, and did not recommend a maximum of two years and did not recommend the $2,500.00 surety bond pending appeal. Although the defense advised the new prosecutor of the agreement, the new prosecutor remained silent while sentence was imposed and the surety bond set. (The government, Solicitor General Office, has now admitted to defense counsel, the validity of the agreement; that the agreement was not kept by the government; and that an erroneous statement was made in the trial court.)

Not only did the new prosecutor breach the written agreement, by remaining silent during sentencing, but also attempted to disavow the agreement, by making an untrue statement to the Court, when defense counsel attempted to proffer the written agreement to the Court.

During the attempted, but unsuccessful, proffer, the Court, for no reason whatsoever, called defense counsel a liar; said he was unfit to practice law; held him in contempt; fined him $100.00; and he was removed from the courtroom by the U.S. Marshal and put in jail.

Although the breach of agreement and the case of *Santobello v. New York*, 404 U.S. 257, was presented to the Court of Appeals for the Fifth Circuit, the Court of Appeals did not rule on this breach. Oral argument had been requested in writing but denied. Rehearing was denied in the Fifth Circuit.

On Petition for Writ of Certiorari, the issue was again raised and was not ruled upon.

The Solicitor General's Office after having investigated and found the validity of the agreement and its breach by the government uncontrovertible, saw fit to lodge a copy of the agreement with the clerk of the United States Supreme Court and admitted, in their brief in opposition, that an erroneous statement was made in the trial court.

The intervening circumstances, to wit: the agreement and the erroneous statement, now admitted, were not ruled upon by the Fifth Circuit because they were not a part of the record at that time.

Certiorari was denied. This Petition for Rehearing due to intervening circumstances and the lack of ruling of the foregoing ensued.

DISCUSSION

This case falls squarely within the principles laid down in *Schriber-Schroth Co. v. Cleveland Trust Co.*, 305 U.S. 47, 59 S.Ct. 8, 83 L.Ed 34, wherein the Supreme Court stated:

> "As the Circuit Court of Appeals did not pass upon other questions in the case, the causes will be reversed and remanded to it for further proceeding in conformity with this opinion. . . ."

In the instant case, as with *Schriber-Schroth Co.*, supra we find the identical situation, in that, the Fifth Circuit Court of Appeals did not rule on the government's

breach of the written pre-trial agreement which was presented together with the applicable law as laid down by the United States Supreme Court's decision in *Santobello v. New York*, 404 U.S. 257.

Furthermore, new evidence was introduced at the Supreme Court level. The Solicitor General lodged the written pretrial stipulation agreement with the Clerk of the United States Supreme Court, as referred to in the Brief in Opposition filed by the government and the government also admitted in their brief that an erroneous statement was made, by the prosecutor, in the trial court. This statement in their brief and the introduction of the agreement with the clerk is certainly intervening circumstances.

These intervening circumstances were not a part of the record before and were also not ruled upon by the Fifth Circuit Court of Appeals.

This defendant has been denied her day in court, in that, the trial court would not permit the introduction of the written agreement and that the United States Circuit Court of Appeals for the Fifth Circuit did not pass on the issue presented. Futhermore should this be permitted to stand unattended to, pretrial agreements between prosecution and defense may well be reduced to a mere nullity, for no prosecutor can be held to his agreement.

The United States Supreme Court in a landmark decision, supposedly put the question of prosecutors breach of agreements to rest once and for all. In *Santobello v. New York*, 404 U.S. 257 (1971), a case essentially on all

fours with the instant case, a different prosecutor appeared at sentencing and failed to honor the agreement. Chief Justice Burger, at page 262, stated:

> "The staff lawyers in a prosecutor's office have the burden of 'letting the left hand know what the right is doing' or has done."

At page 266, the Court in citing other cases, said:

> "The lower courts, however, have uniformly held that a prisoner is entitled to some form of relief when he shows that the prosecutor reneged on his sentencing agreement made in connection with a plea bargain, most jurisdictions preferring vacation of the plea on the ground of involuntariness, . . . *As one author has stated, the basis for outright vacation is 'an outraged sense of fairness when a prosecutor breaches his promise in connection with sentencing'.*" (Emphasis added)

At page 267, the Court went on to say,

> "Where the 'plea bargain' is not kept by the prosecutor, *the sentence must be vacated . . .*" (Emphasis added)

CONCLUSION

1. The validity of the pre-trial written agreement is uncontrovertible as a copy has now been lodged with the clerk of this court by the Solicitor General.

2. The breach, by the government is uncontrovertible, as the breach is now admitted by government. (Solicitor General)

3. The issue raised here has never been ruled upon by the Circuit Court of Appeals, for the Fifth Circuit. Their opinion gives it no mention whatsoever.

4. It's also a matter of record that new evidence, that has not been been ruled upon, was introduced at the Supreme Court level. The Solicitor General lodged a copy of the pretrial stipulation agreement with the Clerk of this Court, and also made an admission that an erroneous statement was made in the trial court.

5. The foregoing are not only uncontrovertible but are also now admitted by the government.

It is therefore respectfully submitted that should this issue be permitted to remain in its present state of flux and not be ruled upon, it will create, at best, ambiguous reliance of prosecutor pretrial agreements and gross untenability in the orderly administration of the law, not to mention the overburden placed upon our already over crowded court calendars.

There must have been an *oversight*, because to allow this to stand is against *all* fairness and the law on these issues.

It is further respectfully submitted that this court should grant certiorari or remand this cause to the Circuit Court of Appeals for the Fifth Circuit for further pro-

ceedings consistent with the law as laid down by *Santobello*, or in the alternative, reverse and remand this cause for trial before a different trial judge.

Respectfully submitted,

/s/ Jack Freed

JACK FREED
Attorney for Defendant
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Miami, Florida 33139
305/379-3647

CERTIFICATE OF SERVICE

I, JACK FREED, attorney for Petitioner, hereby certify that I have this 31st day of May 1974, served by Air Mail three printed copies of the foregoing Petition for Rehearing to the United States Court of Appeals for the Fifth Circuit; three printed copies to the Solicitor General, Department of Justice, Washington, D.C. 20530 and three printed copies, by regular mail to Robert Rust, United States Attorney for the Southern District of Florida, at 14 N.E. 1st Avenue, Suite 300 Ainsley Building, Miami, Florida 33132.

/s/ Jack Freed

JACK FREED